GAHC010248452018

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : C.Ex.App./84/2018

PREMIER CRYOGENICS LIMITED
A PUBLIC LTD. COMPANY FORMED UNDER THE PROVISIONS OF INDIAN COMPANIES ACT HAVING IT'S MANUFACTURING UNIT AT SAUKUCHI, LOKHRA ROAD, GUWAHATI-782034, KAMRUP (M), ASSAM AND REPRESENTED BY ITS MANAGING DIRECTOR MR. ABHIJIT BAROOAH 46 YEARS

VERSUS

THE COMMISSIONER CENTRAL EXCISE AND SERVICE TAX
CENTRAL EXCISE AND SERVICE TAX, GUWAHATI DIVISION, G.S. ROAD, GUWAHATI 781005

Advocate for the Petitioner : MR. D SARAF

Advocate for the Respondent : Mr. S. C. Keyal, SC, Central Excise.

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MR. JUSTICE SUMAN SHYAM

Date of hearing : **04.06.2024**

Date of judgment : **12.06.2024**

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JUDGMENT & ORDER (CAV)

(Suman Shyam,J)

Heard Mr. D. Saraf, learned counsel appearing for the appellant. Also heard Mr. S. C. Keyal, learned counsel representing the respondent.

2. This appeal has been preferred by the assessee (M/S Premier Cryogenics Limited) assailing the order dated 02.05.2018 passed by the learned Central Excise and Service Tax Appellate Tribunal (CESTAT), Kolkata in Excise Appeal No.E/75264/15, partly allowing the appeal filed by the assessee against the order dated 25.11.2014 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Guwahati.

3. The facts of the case, in a nutshell, are that the appellant herein is engaged in the business of manufacture of oxygen/nitrogen and is registered under the Central Excise Department vide Registration No.AABCP6683NXM001 and Service Tax Registration No.AABCP6683NXM001 having its manufacturing unit at Saukuchi, Lokhra Road, Guwahati, Assam. The manufacturing unit of the appellant commenced its commercial production on 26.03.2004. Under the Notification No.32/99-CE dated 08.07.1999 issued by the Central Government, the appellant was entitled to exemption on the credit of CENVAT including exemption on capital expenditure. As per the projection made in this appeal, the appellant had procured capital goods from M/S INOX Air Products Ltd. for use in the factory during the year 2007-08. However, the plants and machineries so procured during the year 2007-08 were not installed/put to use in the factory until the year 2011. The assessee had availed

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CENVAT credit amounting to a sum of Rs.22,93,920/- during the financial year 2010-11 and 2011-12 on capital goods received during the months of November, 2007, December, 2007 and January, 2008. According to the Revenue, CENVAT credit amounting to Rs.22,93,920/- against capital goods was available to the assessee only during the financial years 2007-08 and 2008-09 in terms of Rule 4(2) of the Cenvat Credit Rules. Therefore, the assessee could have utilized the Cenvat Credit upto 50% towards payment of Central excise duty only in those financial years and the balance 50% could have been used in the subsequent financial years.

4. Although the assessee had claimed that these facts were within the knowledge of the jurisdictional authorities, yet, according to the Revenue, the fact that the machineries were procured in 2007 and 2008 were not disclosed by the assessee. It was only during an audit inspection that these facts come to light. As such, vide Show Cause notice dated 18.12.2012 the assesee was asked to show cause as to why the erroneous refund of excise duty amounting to Rs.15,95,332/- sanctioned during the period from November 2007 to January, 2008 as well as the wrongful availment of CENVAT credit amounting to Rs.22,93,920/- during the financial years 2010-11 and 2011-12 should not be recovered from the assessee.

5. Based on the proceedings initiated on the basis of the aforementioned show cause notice, the Additional Commissioner of Central Excise and Service Tax, Guwahati had passed Order –in-Original No.39/Addl.Commr/BT/CE/ GHY/12-13 dated 29.05.2013 whereby, it was held that the amount demanded by the Revenue was not recoverable from the assessee under the law. Aggrieved by the order dated

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29.05.2013, the Revenue went in appeal before the Commissioner (Appeals) Customs, Central Excise & Service Tax (NER), Guwahati. By the order dated 25.11.2014, the Commissioner (Appeals) Customs, Central Excise & Service Tax (NER) had interfered with the Order-in-Original dated 29.05.2013, thus allowing the appeal filed by the Revenue. The operative part of the order dated 25.11.2014 is reproduced herein below for ready reference :-

> "*12. I have gone through the records of the case and submissions made in the appeal. The issue to be decided in this case is that whether the appellants can take/utilize Cenvat credit during the month subsequent to the months in which these were available when the appellants are availing exemption under the notification No.32/99-CE dated 8/7//99. To examine the issue it is relevant to mention the condition as envisaged in para 2B of the notification No.32/99-CE dated 8/7//99.*
>
> > "*2B. In cases where all the gods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this notification shall be subject to the condition that the manufacturer first utilizes whole of the Cenvat Credit available to him in the last date of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash.*"
>
> *13. I find that para 2B of the said notification is a substantive condition and the appellant has violated the said condition rendering them non-entitlement of the benefit of the said notification. I also find that CBEC vide letter F.No.101/04/2003-CX.3 dated 04/06/2009 has clarified that when the manufacturer has not availed credit and consequently paid higher amount in cash, the amount of the said non-availed credit is to be deducted from the amount to be paid as refund, instead of rejecting the entire refund claim.*
>
> *14. I find that the capital goods were received by the respondent assessee*

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in the year 2007-08 and 2008-09 and these were stated to have been installed/used in the factory in the year 2010-11 and the appellant was availing area based exemption in terms of notification No.32/99-CE dated 8/7//99. The Board's Circular referred above clarified the manner in which the credit is to be availed/utilized while availing exemption under the said notification. As regards the suppression of facts etc. I find that the case was detected in course of departmental audit. Had there been no audit the matter would have remained suppressed. Therefore, invocation of extended period is found justified.

15. The case laws cited by the appellant are misplaced because the fact of those cases are not similar to that of appellant's case in as much as it is not the case of denial of Cenvat Credit but on the contrary the case arose only because of non availment and consequently non-utilisation of Cenvat credit which was available to the appellant.

16. Hence Cenvat credit which were not availed and utilized on the last day of the month in which it was available but utilized in subsequent months and consequently paid higher amount in cash, the amount of the said non-availed credit is to be deducted from the amount to be paid as refund.

17. I find that the adjudicating authority has erred in not confirming the demand being the amount of credit not availed and utilized in the last day of the month in which credit was available.

18. In view of the above the appeal filed by the department is allowed."

6. Assailing the order dated 25.11.2014 the assessee i.e. the appellant herein had preferred Excise Appeal No.E/75264/15 before the Central Excise and Service Tax Appellate Tribunal (CESTAT), Kolkata, which was disposed of by the impugned judgment and order dated 02.05.2018. The operative part of the order dated 02.05.2018 is reproduced herein below for ready reference :-

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"6. The claim of the appellant that these facts were known to the jurisdictional authority does not impress; the refund claim did not contain any declaration of procurement of capital goods without availment of CENVAT credit. As far as the subsequent availment CENVAT credit is concerned, without a finding of ineligibility for the amount claimed and in view of recovery of refund that was in excess of such deferred credit, we hold that the entitlement to CENVAT credit is not deniable. Recovery of that amount is not correct in law. Accordingly, the appeal of M/S Premier Cryogenics Ltd. is allowed to the extent of setting aside the demand of Rs.22,93,920/- while upholding the recovery of Rs.15,95,332/-."

7. It appears from the case records that being partly aggrieved with the order dated 02.05.2018 the Revenue had preferred C. Ex. Appeal No.2/2020 before this Court. However, the said appeal was subsequently closed on account of the fact that the sum of Rs.22,93,920/- involved in the appeal was below the pecuniary limit of Rs.1,00,00,000/- (Rupees One Crore) fixed by the Ministry of Finance for the High Court to entertain an appeal of this nature. As such, only the appeal preferred by the assessee against the impugned order dated 02.05.2018 survived for consideration by this Court.

8. Assailing the impugned order dated 02.05.2018, in so far as the same upholds the demand for recovery of a sum of Rs.15,95,332/- being the CENVAT credit availed by the appellant on the capital goods procured in the years 2007-08 and 2008-09 is concerned, Mr. Saraf has argued that even though the capital goods were procured in the years 2007-08 and 2008-09 but the machineries so procured were not installed/put to use in the factory until the year 2011. Therefore, the CENVAT credit was claimed by the appellant only in the year 2011 upon installation of the

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machineries. Contending that there is no provision either in the CENVAT Credit Rules, 2004 or the Central Excise Notification dated 08.07.1999 laying down that the CENVAT credit would have to be availed only in the year of procurement, failing which, such claim would be barred in the subsequent years, Mr. Saraf has argued that the reliance placed on the definition of "Capital Goods" in Rule 2(a) of the CENVAT Credit Rules, 2004 to deny the claim of the appellant is wholly erroneous in the facts and circumstances of the present case.

9. By referring to a decision of the Supreme Court in the case of **Madras Cements Ltd. vs. Commissioner of Central Excise** reported in **2010 (6) SCC 606** Mr. Saraf has further argued that in order to avail CENVAT credit over capital goods, the only thing that the assessee would be required to satisfy is that the capital goods were utilized for manufacturing during the period of validity of the exemption notification.

10. By referring to another decision of the Supreme Court rendered in the case of **KCP Ltd. vs. Commissioner of Central Excise, Chennai** reported in **2014 (1) SCC 597** Mr. Saraf has argued that unless the capital goods are installed in the factory it would be wholly impermissible for his client to claim CENVAT credit on such capital goods for the year 2007-08. On such grounds the learned counsel for the appellant has prayed for setting aside the impugned judgment and order dated 02.05.2018, in so far as the same relates to upholding the demand of recovery of Rs.15,95,332/- from the appellant, is concerned.

11. Responding to the above argument, Mr. S. C. Keyal, learned counsel for the respondent has submitted that the provisions of the Cenvat Credit Rules, 2004 more

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particularly, Rule 2(a), makes it clear that the capital goods would have to be used in the factory for availing CENVAT credit. According to Mr. Keyal, the assessee would be entitled to claim CENVAT credit to the extent of 50% of the amount at the end of the same financial year but it cannot carry forward its entire claim beyond the year of procurement. To that extent, he submits, CENVAT credit availed by the appellant on account of capital goods was illegal and therefore, the learned Tribunal has rightly permitted recovery of the same.

12. We have considered the arguments made at the Bar and have also gone through the materials available on record.

13. The learned counsel for the both parties have placed heavy reliance on the provisions of Rule 2 as well as Rule 4 of the Cenvat Credit Rules, 2004 so as to substantiate their respective arguments. Rule 2(a) of the Cenvat Credit Rules, 2004 defines "capital goods" which reads as follows :-

> "*RULE 2. Definitions. — In these rules, unless the context otherwise requires, - (a) —capital goods‖ means :-*
>
> *(A) the following goods, namely :-*
>
> > *(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, [heading 6805, grinding wheels and the like, and parts thereof falling under [heading 6804 and wagons of sub-heading 860692]] of the First Schedule to the Excise Tariff Act;*
> >
> > *(ii) pollution control equipment;*
> >
> > *(iii) components, spares and accessories of the goods specified at (i) and (ii);*
> >
> > *(iv) moulds and dies, jigs and fixtures;*

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(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; [* *]*

(vii) storage tank, [and]

[(viii) motor vehicles other than those falling under tariff headings 8702, 8703, 8704, 8711 and their chassis [but including dumpers and tippers],] used – "

14. Rule 4 of the Rules of 2004 deals with the conditions for allowing CENVAT credit. Rule 4 is extracted herein below for ready reference :-

"*RULE 4. Conditions for allowing CENVAT credit. — (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service:*

[Provided that in respect of final products, namely, articles of [jewellery or other articles of precious metals falling under Heading 7113 or 7114, as the case may be] of the First Schedule to the Excise Tariff Act, the CENVAT credit of duty paid on inputs may be taken immediately on receipt of such inputs in the registered premises of the person who get such final products manufactured on his behalf, on job work basis, subject to the condition that the inputs are used in the manufacture of such final product by the job worker :]

[Provided further that the CENVAT credit in respect of inputs may be taken by the provider of output service when the inputs are delivered to such provider, subject to maintenance of documentary evidence of delivery and location of the inputs :]

[Provided also that the manufacturer or the provider of output service shall not take CENVAT credit after [one year] of the date of issue of any of the documents specified in sub-rule (1) of rule 9.]

(2)(a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service [or outside the

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factory of the manufacturer of the final products for generation of electricity for captive use within the factory,] at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year :

Provided that the CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year if such capital goods are cleared as such in the same financial year :

*[Provided further that the CENVAT credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, [* * * *] in respect of capital goods shall be allowed immediately on receipt of the capital goods in the factory of a manufacturer :]*

[Provided also that where an assessee is eligible to avail of the exemption under a notification based on the value of clearances in a financial year, the CENVAT credit in respect of capital goods received by such assessee shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year :

[Provided also that the CENVAT credit in respect of capital goods may be taken by the provider of output service when the capital goods are delivered to such provider, subject to maintenance of documentary evidence of delivery and location of the capital goods.]

[Explanation. - For the removal of doubts, it is hereby clarified that an assessee shall be "eligible" if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year, computed in the manner specified in the said notification, did not exceed rupees four hundred lakhs.]

(b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output

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service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under [heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804] of the First Schedule to the Excise Tariff Act, are in the possession of the manufacturer of final products, or provider of output service in such subsequent years."

15. A conjoint reading of the provisions of Rule 2(a) and Rule 4 of the Rules of 2004 go to show that while Rule 2(a) lays down the definition of "capital goods", the conditions for providing CENVAT credit under the Rules are laid down under Rule 4. A plain reading of Rule (2)(b) of Rule 4 shows that balance of CENVAT credit may be availed in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer. Rule (2)(a) of Rule 4 of the Rules of 2004 provides that CENVAT credit in respect of capital goods received in a factory or in the premises of the provider at any point of time in a given financial year shall be taken only for an amount not exceeding 50% of the duty paid on such capital goods in the same financial year. However, neither Rule 4 nor Clause 2B contained in the Notification dated 08.07.1999 creates any embargo in claiming CENVAT credit with regard to capital goods in any subsequent financial year, provided the same has been installed in the factory in such subsequent years. The only requirement under the Rules and the notification appears to be that there must be actual installation and use of the capital goods in the factory for availing CENVAT Credit. Our attention also could not be drawn to any provision of the Rules or the relevant notification which makes it mandatory for the assessee to install all capital goods in the year of procurement itself so as to avail CENVAT credit.

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16. It is no doubt correct that as per Rule 2(a) of the Rules of 2004 it would be open for the assessee to avail upto 50% of CENVAT credit in the financial year when the capital goods were procured. However, as noted above, Rule 2(a) of the Rules does not make it mandatory for the assessee to lodge a claim for Cenvat Credit only in the year of procurement of the machinery. On the contrary, what it does is that a ceiling of 50% of Cenvat Credit has been imposed in the year of procurement of the Capital Goods. Rule 2(a) does not also debar the assessee from claiming CENVAT credit during the financial years when the capital goods were actually installed in the factory. As long as the CENVAT credit is availed during the period of exemption available under the Notification dated 08.07.1999, the claim of the assessee, in our view, would not stand extinguished merely because the Cenvat Credit claim was not lodged nor availed during the financial years when the capital goods were procured. As such, we are of the considered opinion that in the facts and circumstances of the present case, there is no cogent basis for this Court to conclude that the assessee had illegally availed CENVAT credit for procurement of the capital goods pertaining to the years 2010-11 and 2011-12. Consequently, the order for recovery of the amount of CENVAT credit as affirmed by the learned Tribunal is held to be unsustainable in the eyes of law.

17. For the reasons stated herein above, we are of the unhesitant opinion that the Commissioner (Appeals), Customs, Central Excise and Service Tax, Guwahati, was not correct in passing the order dated 25/11/2014 particularly in so far as allowing the demand for recovery of Rs. 15,95,332/- as CENVAT credit availed by the appellant on the capital goods is concerned. Consequently, the judgment and order dated

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02/05/2018 passed by the CESTAT to the extent of allowing the above recovery, is also held to be unsustainable in law. As such, the impugned judgment and order dated 02/05/2018 is hereby set aside.

18. The appeal is allowed accordingly.

Parties to bear their own cost.

JUDGE **CHIEF JUSTICE**

T U Choudhury/ Sr.PS

Comparing Assistant

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